

1 THE HONORABLE JAMAL N. WHITEHEAD
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11 UNITED STATES DISTRICT COURT
12 WESTERN DISTRICT OF WASHINGTON
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19 IN RE VALVE ANTITRUST LITIGATION
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Case No. 2:21-cv-00563-JNW

ELLIOTT PLAINTIFFS' MOTION TO
INTERVENE FOR LIMITED
PURPOSE OF OPPOSING MOTION
TO CONSOLIDATE AND APPOINT
INTERIM LEAD CLASS COUNSEL

NOTE FOR MOTION CALENDAR:
November 12, 2024

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Other Authorities

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I. PRELIMINARY STATEMENT

Proposed Intervenors John Elliott, Ricardo Camargo, Javier Rovira, and Bradley Smith, the plaintiffs in the related matter of *Elliott v. Valve Corporation*, 2:24-cv-01218-JNW (W.D.Wash.) (the “*Elliott*” action), respectfully request to intervene in the present action for the limited purpose of opposing the pending motion to consolidate and appoint Vorys, Sater, Seymour, and Pease LLP (“Vorys”) as interim consumer class counsel, pursuant to Fed. R. Civ. P. 24(a) and (b).

In 2021, a group of game publishers and game consumers filed a class action complaint in this Court, alleging that Valve engages in anticompetitive practices to monopolize personal computer (“PC”) gaming markets. Valve moved to compel arbitration of the consumers’ claims, relying on the arbitration clause in the Steam Subscriber Agreement (“SSA”). This Court granted Valve’s motion, holding that the threshold issue of arbitrability needed to be resolved in arbitration. *See* Dkt. No. 66. As a result, claims brought by game consumers were stayed pending arbitration. *Id.*

After arbitration of the consumer claims was compelled, Vorys was appointed to the executive committee representing *publishers* in this instant case. See Dkt. No. 91 at 1 n.1 (“The proposed leadership structure here applies only to the game publisher plaintiffs.”); Dkt. No. 92 (court order). Subsequently, Vorys and the rest of the *Wolfire* leadership elected to drop all consumer claims from their operative pleadings. Dkt. Nos. 99 & 127.

While Vorys has been representing publishers only and litigating this action on their behalf, the named plaintiffs in the current *Elliott* action successfully challenged Valve’s arbitration provision, obtaining a series of arbitrator rulings deeming it unenforceable. These rulings prompted Valve to drop the arbitration provision from its consumer-facing agreements, Dkt. No. 362, making it possible for consumers to challenge Valve’s anticompetitive conduct in federal court. The *Elliott* Plaintiffs’ subsequently brought suit on behalf of a national consumer class against Valve in this Court on August 8, 2024. *Elliott*, Dkt. No. 1.

Despite lacking a case in which consumer claims are asserted, on October 4, 2024, Vorys requested this court to (1) consolidate the *Wolfire* action and *Elliott* action and (2) appoint Vorys

1 as interim lead class counsel for the consumer class. Consumer plaintiffs in the related *Elliott*
 2 action seek to oppose this motion.

3 Under Fed. R. Civ. P. 24(a), intervention by the *Elliott* Plaintiffs should be permitted for
 4 the limited purpose of opposing Vorys' motion because, among other things, the Intervenors'
 5 interests are not adequately protected by parties in this case, particularly due to the conflict of
 6 interest posed by Vorys, who serves as class counsel for publishers in this action. The disposition
 7 of Vorys' motion could impair the Intervenors' ability to pursue their case against Valve and secure
 8 relief via counsel without any conflict of interest. Alternatively, the Court should permit the
 9 requested limited intervention under Rule 24(b), as all elements of Rule 24(b) intervention are
 10 satisfied and granting intervention at this early stage, for the limited purpose requested, would not
 11 prejudice any parties' rights in *Wolfire*.

12 **II. LEGAL STANDARD FOR INTERVENTION UNDER RULE 24**

13 Federal Rule of Civil Procedure 24 provides for two methods of intervention: intervention
 14 by right and permissive intervention. The requirements of Rule 24 "traditionally receives liberal
 15 construction in favor of applicants for intervention." *Arakaki v. Cayetano*, 324 F.3d 1078, 1083
 16 (9th Cir. 2003). Courts are guided primarily by practical and equitable considerations. *Id.*

17 Under Rule 24(a)(2), a nonparty is entitled to intervene as of matter of right when it "(i)
 18 timely moves to intervene; (ii) has a significantly protectable interest related to the subject of the
 19 action; (iii) may have that interest impaired by the disposition of the action; and (iv) will not be
 20 adequately represented by existing parties." *Oakland Bulk & Oversized Terminal, LLC v. City of*
Oakland, 960 F.3d 603, 620 (9th Cir. 2020).

22 Alternatively, a court may, in its discretion, grant permissive intervention where the
 23 applicant "has a claim or defense that shares with the main action a common question of law or
 24 fact." Fed. R. Civ. P. 24(b)(1)(B). Generally, Rule 24(b) allows permissive intervention where the
 25 proposed intervenor shows "(1) an independent ground for jurisdiction; (2) a timely motion; and
 26 (3) a common question of law and fact between the movant's claim or defense and the main
 27 action." *Blum v. Merrill Lynch Pierce Fenner & Smith Inc.*, 712 F.3d 1349, 1353 (9th Cir. 2013).
 28 "Permissive intervention is committed to the broad discretion of the district court." *Cnty. of*

1 *Orange v. Air Cal.*, 799 F.2d 535, 539 (9th Cir. 1986). In exercising its discretion, the court must
 2 also “consider whether the intervention will unduly delay or prejudice the adjudication of the
 3 original parties’ rights.” Fed. R. Civ. P. 24(b)(3).

4 The requirements under either provision of Federal Rule of Civil Procedure 24 are readily
 5 met. Intervenors should be permitted to intervene for the limited purpose of opposing Vorys’
 6 motion to consolidate and appoint Vorys as interim lead class counsel for consumers.

7 III. ARGUMENT

8 A. Intervenors should be permitted to intervene as a matter of right.

9 *First*, intervention is timely. Vorys’ motion to consolidate and appoint as interim lead class
 10 counsel for the consumer class is still pending in this Court. Dkt. No. 373. Proposed Intervenors
 11 filed this motion within the time allowed to respond pursuant to local rules. No legally significant
 12 proceedings have taken place with respect to Vorys’ motion. Dkt. No. 66.

13 *Second*, Intervenors possess a significant, protectable interest in the outcome of Vorys’
 14 motion to consolidate and be appointed lead counsel. If that motion were to be granted,
 15 Intervenors’ separately filed action would be consolidated with the *Wolfire* action, and
 16 Intervenors’ chosen counsel would be displaced by Vorys.

17 *Third*, the Intervenors’ interests will be impaired by the disposition of Vorys’ motion.
 18 Vorys not only seeks to displace the Intervenors’ choice of counsel, but its request could also
 19 undermine the interests of the consumer class by having conflicted class counsel represent both
 20 consumers and game publishers in this case.

21 Finally, Intervenors’ and absent class members’ interests are not adequately protected by
 22 the existing parties in the *Wolfire* action. There currently is no other consumer case against Valve
 23 challenging Valve’s anticompetitive conduct. Vorys and the rest of the *Wolfire* leadership chose
 24 to drop consumers’ claims after arbitration was compelled. Dkts. No. 99 & 127. Vorys, serving as
 25 the class counsel of game publisher only, has been actively litigating against Valve and has put
 26 forth a damages model that requires allocating one pool of overcharges between publishers and
 27 consumers—creating an irreconcilable conflict between publishers and consumers when it comes
 28 to assessing the anticompetitive effects of Valve’s conduct and measuring damages. The interests

1 of absent class members are not adequately protected in the *Wolfire* action. Accordingly, the Court
 2 should grant this motion and permit intervention.

3 **B. Alternatively, permissive intervention by Intervenors is warranted.**

4 The district court's discretion under Rule 24(b) to grant "an application for permissive
 5 intervention includes discretion to limit intervention to particular issues." *Dep't of Fair Emp't &*
Housing v. Lucent Techs., Inc., 642 F.3d 728, 741 (9th Cir. 2011) (quoting *Van Hoomissen v.*
Xerox Corp., 497 F.2d 180, 181 (9th Cir. 1974)). Permissive intervention should be granted where,
 8 as here, the *Elliott* plaintiffs seek timely intervention for the limited purpose of opposing Vorys'
 9 motion to consolidate and to be appointed as interim lead counsel for consumers.

10 Intervenors have an independent ground for jurisdiction as they are properly before the
 11 Court in *Elliott*. Their filing is timely because the motion that Intervenors intend to oppose is still
 12 pending.¹ Additionally, there are common questions of law and fact between the two actions, not
 13 limited to the fundamental question presented by Vorys' motion—i.e., who should represent the
 14 consumer class. The parties in this action will not suffer any prejudice if intervention is granted,
 15 and intervention will ensure that the Court hears all viewpoints, including from members of the
 16 consumer class who oppose Vorys' application, before determining which counsel should be
 17 appointed to represent the consumer class.

18 **IV. CONCLUSION**

19 For the foregoing reasons, Intervenors respectfully request limited intervention for the
 20 purpose of opposing Vorys' motion for consolidation and appointment as interim consumer class
 21 counsel.

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 27 ¹ See *Bolooki v. Honda Motor Co. Ltd.*, 2023 WL 2626990 (C.D. Cal. Jan. 12, 2023)
 28 (granting permissive intervention for plaintiffs seeking to represent an identical class two weeks
 after the other plaintiffs moved to be appointed as interim class counsel).

1 DATED: October 21, 2024

Respectfully submitted,

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1 **CERTIFICATE OF COMPLIANCE WITH WORD LIMIT**

2 I hereby certify that this memorandum contains 1,389 words, excluding the caption, table
3 of contents, table of authorities, signature blocks, and certificate of service, in compliance with
4 the Local Civil Rules.

5 DATED this 21st day of October, 2024.

6 _____
7 */s/ Steve W. Berman*

Steve W. Berman

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on October 21, 2024, a true and correct copy of the foregoing was filed
3 electronically by CM/ECF, which caused notice to be sent to all counsel of record.

4 */s/ Steve W. Berman* _____
5 Steve W. Berman